

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
TOWN OF NEW HAVEN, VERMONT
Request for Waiver of Section 90.175 of the
Commission's Rules to Modify Station
WPMP419, New Haven, Vermont, Operating on
Narrow Bandwidth Emissions
File No. 0002937722

ORDER

Adopted: March 4, 2009

Released: March 4, 2009

By the Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. On March 6, 2007, the Town of New Haven, Vermont (New Haven) filed an application and request for waiver of Section 90.175 of the Commission's rules, seeking to modify its license for Station WPMP419, New Haven, Vermont. Specifically, New Haven seeks approval to migrate from an analog "wide" emission designator to an analog "narrow" emission designator without obtaining frequency coordination required under Section 90.175. On July 11, 2007, we sought comment on the request. For the reasons stated below, we grant the request, subject to a condition.

II. BACKGROUND

2. In 2003, the Commission adopted rules to foster a more timely transition to narrowband technology. In 2004, the Commission, inter alia, established January 1, 2013 as the deadline by which Public Safety Radio Pool licensees, such as New Haven, must migrate either to 12.5 kHz technology or to another technology that achieves the narrowband equivalent of one channel per 12.5 kHz of channel bandwidth.

1 See File No. 0002937722 and accompanying Letter from Ronald P. Kumetz, Jr., Falcon Communications to FCC (filed Mar. 6, 2007) (Waiver Request).

2 47 C.F.R. § 90.175.

3 Id. New Haven currently operates frequency 155.8800 MHz using a 20 kHz emission and seeks to add a narrower 11 kHz emission on frequency 155.8800 MHz.

4 Public Safety and Homeland Security Bureau Seeks Comment on Request for Waiver Filed by the Town of New Haven, Vermont, to Transition to Narrow Bandwidth Emissions Without Frequency Coordination, Public Notice, 22 FCC Rcd 12858 (PSHSB 2007).

5 See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, WT Docket No. 99-87, RM-9332, Second Report and Order and Second Further Notice of Proposed Rule Making and Order, 18 FCC Rcd 3034, 2028 ¶ 12 (2003) (Second Report and Order).

6 See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, WT Docket No. 99-87, RM-9332, Third

3. New Haven seeks to modify its license for Station WPMP419 from a wide emission designator (*e.g.*, 16K0F3E or 20K0F3E) to a narrow emission designator (*e.g.*, 11K0F3E) on frequency 155.8800 MHz, ahead of the designated January 1, 2013 transition deadline.⁷ New Haven proposes no new technical modifications other than the addition of a narrow emission designator.⁸ Because New Haven's application seeks a change in the type of emission, which is a major modification,⁹ Section 90.175 requires a showing of frequency coordination.¹⁰ In support of its request, New Haven cites to the "cost and paperwork burden"¹¹ associated with frequency coordination. According to New Haven, frequency coordination in this instance would not serve the underlying purpose of Section 90.175 because the proposed modification from analog wideband to analog narrowband technology would not cause co-channel or adjacent channel interference.¹² New Haven states that the substantial cost and time required for frequency coordination are contrary to the public interest.¹³

4. *Public Notice.* On July 11, 2007, we sought public comment on New Haven's request.¹⁴ In response, we received comments from the Enterprise Wireless Alliance (EWA), the Association of Public Safety Communications Officials-International, Inc. (APCO), the International Association of Fire Chiefs, Inc. (IAFC), and the International Municipal Signal Association (IMSA).¹⁵ EWA supports the Waiver Request.¹⁶ EWA states the proposed modification would not affect co-channel or adjacent channel licenses, and would promote spectrum efficiency within Very High Frequency (VHF) public safety allocations.¹⁷

5. APCO and IMSA/IAFC oppose the Waiver Request.¹⁸ Both APCO and IMSA/IAFC dispute New Haven's claims of cost and delay associated with frequency coordination.¹⁹ APCO and

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Memorandum Opinion and Order, Order, and Third Further Notice of Proposed Rule Making, 19 FCC Rcd 25045, 25047 ¶ 2 (2004) (*Third MO&O*).

⁷ See Waiver Request at 1; File No. 0002937722 (Frequencies tab).

⁸ *Id.*

⁹ See 47 C.F.R. § 1.929(c)(4)(ii).

¹⁰ 47 C.F.R. § 90.175. An applicant is obligated to provide the frequency coordinator with all information necessary for the frequency coordination. 47 C.F.R. § 90.175(a). In turn, the frequency coordinator must file a statement in support of its recommendation as to whether the application should be granted. 47 C.F.R. § 90.175(b). The extent to which frequency coordination is necessary when licenses are modified in certain ways is the subject of an ongoing proceeding. See Amendment to Part 90 of the Commission's Rules, WP Docket No. 07-100, *Notice of Proposed Rulemaking and Order*, 22 FCC Rcd 9595, 9596-9597 ¶ 3 (2007) (*Notice of Proposed Rulemaking and Order*). The scope of the instant Order is limited solely to the particular facts raised by the Waiver Request. The decision in this Order in no way prejudices the direction or final outcome of the *Notice of Proposed Rulemaking and Order* in WP Docket No. 07-100.

¹¹ Waiver Request at 1.

¹² *Id.*

¹³ *Id.*

¹⁴ See *supra* note 4.

¹⁵ IAFC and IMSA filed comments jointly (collectively, IAFC/IMSA Comments).

¹⁶ EWA Comments at 1.

¹⁷ *Id.*

¹⁸ APCO Comments at 2; IMSA/IAFC Comments at 2.

¹⁹ *Id.*

IMSA/IAFC also express concern that the non-coordination of applications proposing to modify emission designators would compromise the accuracy of the frequency coordinator's database as well as the Commission's Universal Licensing System (ULS) because such changes often include other modifications critical to the coordination process.²⁰ For example, both APCO and IMSA/IAFC cite the fact that New Haven's application now indicates an Effective Radiated Power (ERP) specification that was not previously indicated in the Commission's database as an example of a change that would not be disclosed if the Commission decides to grant applications such as New Haven's without requiring frequency coordination.²¹

III DISCUSSION

6. To obtain a waiver of the Commission's rules, an applicant must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²² An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.²³

7. Under Section 90.175, an application requesting a major modification in existing facilities must include a showing of frequency coordination.²⁴ New Haven's proposal to modify Station WPMP419 from an analog wide emission designator to an analog narrow emission designator constitutes a major modification.²⁵ Although the "cost and paperwork burdens" cited by New Haven do not alone constitute a basis to waive frequency coordination, for the reasons discussed below, we find that a waiver is warranted, subject to condition, in light of the particular facts surrounding the instant request. Specifically, we find that a waiver is warranted because the underlying purpose of the Section 90.175 frequency coordination requirement would not be served in the limited context of an analog-to-analog, wideband-to-narrowband technology migration where no new technical modifications are proposed. We also find that grant of the Waiver Request would be in the public interest.

8. We find that granting the Waiver Request would not undermine the purposes of the frequency coordination process; that is, to ensure the quality of frequency selections, expedite licensing, and improve spectrum efficiency to the benefit of private land mobile radio users.²⁶ APCO and IMSA/IAFC believe that frequency coordination is necessary to ensure that other modifications critical to the coordination process are properly evaluated and disclosed in the Commission's ULS as well as in the frequency coordinator's database. In support of this position, APCO and IMSA/IAFC point out that the Application now identifies an ERP for frequency 155.8800 MHz that had not been previously specified in

²⁰ APCO Comments at 2-3 & n.1; IMSA/IAFC Comments at 2, 3.

²¹ APCO Comments at 2-3; IMSA/IAFC Comments at 3.

²² 47 C.F.R. § 1.925(b)(3).

²³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972) (*citing Rio Grande Family Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); Birach Broad Corp., *Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

²⁴ 47 C.F.R. § 90.175(a).

²⁵ See 47 C.F.R. § 1.929(c)(4)(1)(ii). With respect to private land mobile radio (PLMR), a change in the type of emission constitutes a major change requiring frequency coordination. *Id.*

²⁶ See Frequency Coordination in the Private Land Mobile Radio Services, *Report and Order*, PR Docket No. 83-737, 103 FCC 2d 1093, 1098-99 ¶ 11 (1986) (*PLMR Frequency Coordination Order*).

New Haven's current authorization for Station WPMP419.²⁷ We agree that having accurate and up-to-date information for purposes of frequency coordination serves an important public interest.²⁸ In this instance, however, New Haven proposes no new or additional modifications, including no change in ERP, other than a migration from an analog wideband to an analog narrowband emission designator. At the same time, we agree with EWA that the proposed modification would not affect co-channel or adjacent channel licenses, and would promote spectrum efficiency within VHF public safety allocations.²⁹

9. In noting the growing demand for scarce PLMR spectrum as well as the limited progress made by the PLMR industry to migrate to more spectrum-efficient systems, the Commission in 2003 determined that "stronger measures would be required to bring about a timely transition to narrowband technology."³⁰ Accordingly, the Commission adopted specific interim deadlines to encourage licensees to begin planning and implementing a migration to narrowband technology well before January 1, 2013.³¹ Here, because New Haven seeks to migrate from an analog wide emission designator to an analog narrow emission designator well in advance of the designated January 1, 2013 transition deadline, we believe that this decision would further the Commission's goal to promote a meaningful transition to narrowband technologies in advance of January 1, 2013, without disturbing the integrity of the frequency coordination process or the Commission's overall spectrum management objectives.

10. To ensure these goals are met, however, we find it necessary to condition grant of the request on New Haven filing a new modification application to delete the wideband emission designator from its license for Station WPMP419 within one year of release of this Order. While we recognize that New Haven may, for a limited time, require use of its current wideband emission facilities in tandem with its newly constructed narrowband emission facilities, we encourage it to migrate fully and expeditiously to the narrowband emission facilities as proposed, consistent with the Commission's rules. We believe that one year from release of this Order will provide New Haven ample time to transition its facilities operating on frequency 155.8800 MHz to narrowband technologies.

11. Lastly, we emphasize that our decision is limited to the particular facts before us. Future requests for waiver of the Commission's frequency coordination rules under Section 90.175 will be considered on a case-by-case basis. In this regard, we note that the Commission, in WP Docket 07-100, is currently considering, *inter alia*, the extent to which frequency coordination is necessary when licenses are modified in certain ways.³² Our decision in this Order in no way prejudices the outcome or limits the Commission's consideration of the broader issue surrounding frequency coordination raised in that proceeding.

III. CONCLUSION

12. Based on our analysis of the particular facts before us and for the reasons stated herein, we find that grant of the Waiver Request is consistent with the public interest. We grant the Waiver Request subject to the requirement that New Haven file a new modification application to delete the

²⁷ APCO Comments at 2-3; IMSA/IAFC Comments at 3.

²⁸ See *PLMR Frequency Coordination Order*, 103 FCC 2d at 1150 ¶ 116 (given the need for a "complete and up-to-date data base of frequency usage . . . for rapid, efficient and accurate frequency recommendations and licensing," the Commission's rules require that proposed uses of Part 90 stations "that could affect other requests or recommendations . . . be made known to coordinators in order for them to provide a useful service.").

²⁹ See EWA Comments at 1.

³⁰ *Second Report and Order*, 18 FCC Rcd at 3038 ¶ 12.

³¹ *Third MO&O*, 19 FCC Rcd at 25055 ¶ 22.

³² See *Notice of Proposed Rulemaking and Order*, *supra* note 10.

wideband emission designator 16K0F3E or 20K0F3E on frequency 155.8800 MHz within one year of release of this Order.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, that the waiver request of Section 90.175 of the Commission's rules, 47 C.F.R. § 90.175, associated with File No. 0002937722, filed by the Town of New Haven, Vermont, on March 6, 2007, is GRANTED.

14. IT IS FURTHER ORDERED that, the Town New Haven, Vermont shall file a new modification application to delete the wideband emission designator 16K0F3E or 20K0F3E on frequency 155.8800 MHz within one year of release of this Order.

15. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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Public Safety and Homeland Security Bureau